DR. TUANG PIK KING

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 54-10-88]
19 NOVEMBER 1988

ADMINISTRATIVE LAW: *Habeas corpus - Validity of detention order and detention - Violation of Article 7(1) of the Constitution - Period of detention under s. 73 of the Internal Security Act 1960 - Place of detention as stipulated in detention order - Sections 3, 5(1) of the Internal (Amendment) Act 1988 - Retrospective legislation.*

This is an application for a writ of *habeas corpus ad subjiciendum*, challenging both the validity of a detention order dated 24 December 1987 issued by the Minister for Home Affairs pursuant to s. 8(1) of the Internal Security Act 1960 and the detention thereunder.

The applicant argued that his detention violated Article 7(1) of the Constitution and secondly that the ground for his detention did not come within the scope of the enabling legislation.

The period during which the applicant had been detained pending enquiries under s. 73 of the Internal Security Act 1960 had exceeded the maximum permissible period for such purpose. Further, the detention order served upon the applicant stipulated that he was to be detained at the Tempat Tahanan Perlindungan, Taiping, Perak for a period of 2 years with effect from 27 December 1987 but he had in fact been detained for the initial part of this period i.e. from 27 December 1987 to 28 December 1987 at the Police Remand Centre at Empat Centre, Empat Tin, Kampong Batu, Jalan Ipoh, Kuala Lumpur.

Held:

[1] Article 7(1) of the Constitution prohibits retrospective penal legislation and is applicable only to criminal matters.

[2] Sections 3 and 5(1) of the Internal Security (Amendment) Act 1988 **nullifies** decision of the Supreme Court in *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. v. Koh Yoke Koon* and they immunize from judicial review detention orders which suffer from defects.

[Application dismissed.]

Cases referred to:

Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. v. Koh Yoke Koon [1988] 2 MLJ 301
Loh Kooi Choon v. Government of Malaysia. [1977] 2 MLJ 187
Re Tan Boon Liat [1976] 2 MLJ 83
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129
Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. v. Karpal Singh [1988] 3 MLJ 29

Legislation referred to:

Federal Constitution, arts. 5(1), 7(1)
Internal Security Act 1960, ss. 8(1), 73
Internal Security (Amendment) Act 1988, s. 3, 5(1)

For the applicant - Lee Min Choon (Chooi Shee Hong with him); M/s. Chooi Shee Hong & Gan
For the respondent - Mohd. Raus bin Sharif, SFC

JUDGMENT

Edgar Joseph Jr J:

The applicant Dr. Tuang Pik King was, at all material times, the headmaster of a Confucian Private Secondary School and the vice chairman of the United Chinese School Teachers Association.

He prays for a writ of *habeas corpus ad subjiciendum* whereby he challenges both the validity of a detention order dated 24 December 1987, issued under the hand of the Minister for Home Affairs ("the Minister") against him pursuant to the provisions of s. 8(1) of the Internal Security Act 1960, ("the principal Act") and his detention thereunder.

The impugned order (T4) was in the following terms:

> That I, the Minister of Home Affairs, being satisfied that the order is necessary to be imposed on the person named below with a view to preventing him from acting in any manner prejudicial to the security of Malaysia.
>
> Name: Tuang Pik King
> NRIC No: 3837021 (B)
>
> By reason therefore and in exercising the powers conferred on me pursuant to s. 8(1) Internal Security Act 1960, I hereby order that the person abovenamed be detained for two years from 27 December 1987 at the Tempat Tahanan Perlindungan Taiping or at any other place that may be ordered by me from time to time.
>
> Signed this 24 December 1987.
> sgd. Dato' Seri Dr. Mahathir
> bin Mohamad
> Menteri Hal Ehwal Dalam Negeri,
> Malaysia.

The ground upon which the impugned order was made ("T5") was as follows:

> That since the year 1986, you, Tuang Pik King, have been involved in activities that would incite the racial sentiments among the various races of the people in this country. All your activities could have threatened the national security.

The allegations of fact upon which the impugned order was based ("the allegations of fact" - "T5") were as follows:

1. That on 2 November 1986 while in a speech at a meeting held at the main lecture hall of University Kebangsaan, Bangi, you have incited the racial sentiment of the Chinese with the allegation that the national education policy formed by the Malay nationalists only based on the language, culture and religion of the Malays only, but had neglected the language, culture and religion of other communities.

2. That on 10 April 1987, during the annual general meeting of GPCSCI held at Lorong Tuanku Abdul Rahman, Kuala Lumpur, you had incited the racial sentiment amongst the Chinese by urging the Government not to carry on with the new economic policy (dasar economi baru) because you claimed that the said policy only benefited one race only.

3. That on 16 July 1987 during a speech at a meeting held at the Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you claimed that the action by Government to amend the Education Act 1961 will jeopardise the rights of Chinese people to learn the Chinese language.

4. That on 4 October 1987 in a gathering with the board of directors of the school, parents and teachers association, Chinese primary school old boys' association of Selangor and Federal Territory at Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you had incited the spread of racial sentiments amongst the Chinese by proposing that classes in Chinese primary schools ought to be boycotted if the issue of appointing the headmaster and senior assistant to headmaster without the qualification of Mandarin in Chinese primary school is not settled by the Government.

5. That on 5 October 1987, during a speech at one meeting held at the Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you had used the issue of appointing the headmaster and senior assistant headmaster without the qualification of Mandarin in the Chinese primary school in order to incite the racial sentiment of the Chinese.

6. That on 8 October 1987, in a meeting attended by 15 Chinese guilds and association and 3 political parties at Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you had incited the racial sentiment of the Chinese by proposing that classes in the Chinese primary school ought to be boycotted if the issue of appointing the headmaster and senior assistant headmaster without the qualification of Mandarin in Chinese primary school is not settled by the Government.

7. That on 11 October 1987 in a meeting attended by 15 Chinese guilds and association and 3 political parties at Thean Hou Temple, Kuala Lumpur, you had incited the racial sentiment of the Chinese by proposing that classes in the Chinese primary school ought to be boycotted if the issue of appointing the headmaster and senior headmaster without the qualification of Mandarin in Chinese school is not settled by the Government.

8. That on 12 October 1987, in a emergency meeting of the Chinese school board of director association of Selangor and Federal Territory at Selangor Chinese Assembly Hall, Kuala Lumpur, you had incited the racial sentiment of the Chinese by proposing that the classes in the primary school ought to be boycotted if the issue of appointing the headmaster and senior assistant headmaster without the qualification of Mandarin in Chinese primary school is not settled by the Government.

Before me, Counsel for the applicant mounted an argument based on two grounds which may be stated broadly and summarily thus: firstly, it was said that the applicant's detention violated Article 7(1) and, secondly, that the ground for his detention did not come within the scope of the enabling legislation.

I shall take firstly the point concerning Article 7(1) which reads:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

Now, having regard to the affidavit evidence, two facts were plain:

(1) the period during which the applicant had been detained pending enquiries under s. 73 of the principal Act was from about 1 a.m. on 28 October 1987 to about 1.30 p.m. on 28 December 1987 and so exceeded the maximum permissible period for this purpose by about thirty six hours.

(2) although the copy of the detention order served upon the applicant stipulated that he was to be detained at the Tempat Tahanan Perlindungan, Taiping, Perak, for a period of two years with effect from 27 December 1987, he had, in fact, been detained for the

initial part of this period, that is to say, from at or about 1 a.m. on 27 December 1987 to at or about 2.30 p.m. on 28 December 1987, at the Police Remand Centre at Empat Centre at Empat Tin, Kampong Batu, Jalan Ipoh, Kuala Lumpur.

In these circumstances, but for the provisions of ss. 3 and 5(1) of the Internal Security (Amendment) Act 1988, ("the Amending Act"), the applicant's contention that his continued detention was not in accordance with the law and therefore in violation of the fundamental right guaranteed under Article 5(1) of the Constitution would be unassailable. (See *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. v. Koh Yoke Koon* [1988] 2 MLJ 301

For convenience, I shall reproduce ss. 3 and 5(1) of the Amending Act; they read as follows:

3. The principal Act is amended by inserting after s. 8 a new s. 8A as follows:

8A. No detention order shall be invalid or inoperative by reason

(a) that the person to whom it relates:

(i) was immediately after the making of the detention order detained in any place other than a place of detention referred to in s. 8(3);

(ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under s. 73 before his removal to a place of detention referred to in s. 8(3), notwithstanding that the maximum period of such detention under s. 73(3) had expired; or

(iii) was during the duration of the detention order on journey in police custody or any other custody to a place of detention referred in s. 8(3); or

(b) that the detention order, was served on him at any place other than the place of detention referred to in s. 8(3), or that there was any substantial defect relating to its service upon him.

5.(1) Where a detention order was made under s. 8(1) of the principal Act against any person during the period between the date of the commencement of the principal Act and the commencement of this Act (hereinafter referred to as "the transitional period"), the detention order and the detention effected in pursuance thereof during the transitional period, and its continuation thereafter, if any, are hereby declared lawful and valid, and shall be deemed to be, and to have always and at all times been, lawful and valid, notwithstanding that at any time during the duration of the detention order he was detained at any place other than the place of detention referred to in s. 8(3) of the principal Act, or continued to be detained in the place in which he was detained under s. 73 of the principal Act after the expiry of the maximum period provided therefor under s. 73(3) of the principal Act, or was on journey in police custody or any other custody to the place of detention as aforesaid, or that there was any delay in the service of the detention order on him, or that it was served on him at any place other than the place of detention, or that there was any defect relating to its service upon him.

I regret I find Counsel's submission totally unacceptable.

Clearly, cl. (1) of Article 7 prohibits retrospective penal legislation and is applicable only to criminal matters as was rightly conceded on behalf of the accused in the case of *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at 193.

It is equally clear, that the object of the legislature enacting ss. 3 and 5(1) aforesaid, was to nullify the decision of the Supreme Court in the case of *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. v. Koh Yoke Koon* (*ibid*) and so to deprive a detainee of the sort of plea

raised in that case even in respect of detention orders under s. 8 of the principal Act made between the date of commencement of the principal Act and the commencement of the Amending Act.

In other words, ss. 3 and 5(1) do not create offences much less render acts of a detainee offences which were not offences before he did them; instead, they merely immunize from judicial review detention orders which suffer from the defects described therein. Consequently, Article 7(1), is utterly irrelevant to the question for decision and no protest under it can possibly succeed.

I shall next take Counsel's second point, which it will be recalled was that the ground for the applicant detention did not come within the scope of the enabling legislation.

In particular, it was submitted that the activities alleged against the applicant, even if true, offended "public order" within the meaning of *Re Tan Boon Liat* [1976] 2 MLJ 83 at 87 but not the security of the country and so did not come within the scope of the principal Act.

To illustrate, Counsel invited my attention to the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985, including the recital thereto, which he considered emphasized the point that acts which merely amounted to breaches of public order were not covered by the principal Act.

Accordingly, Counsel invited me to hold that since the powers of preventive detention under s. 8(1) of the principal Act could not be invoked in respect of acts which merely touch public order the Minister had, in this case, acted *ultra vires* the powers conferred upon him.

Now, turning to the affidavit in opposition affirmed to by the Minister on 15 July 1988, it was alleged therein, *inter alia*, and I quote:

> I was satisfied that the applicant's detention was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia, and I accordingly made the detention order. I did apply my mind to the facts of the applicant's case, and I state that the detention order against the applicant was made in good faith and after being satisfied that his detention was necessary with a view to prevent him from acting in any manner prejudicial to the security of Malaysia or any part thereof.

The Minister had, however, conceded that of the eight allegations of fact levelled against the applicant, one of them, namely allegation 5, which concerned "the issue of headmasters and senior assistant teachers not qualified in Mandarin, had been included by my officer in error." But, he had gone on to say that "notwithstanding the error, I would have been no less satisfied that the applicant's detention was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia."

It is obvious, therefore, that the ground for the applicant's detention had been categorically stated to be his involvement in activities which would incite racial sentiment among the various races of the people in this country and so threaten national security. Such a ground is plainly within the scope and ambit of the enabling legislation, namely s. 8 of the principal Act, and nothing more need be said about the point.

As for the allegations of fact, having regard to the decision of the Federal Court in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, it is not open to me to consider either the question whether there was reasonable cause to make the detention order or the protestations of innocence of the applicant.

I would conclude by quoting the following passage from the judgment of Tan Sri Abdul Hamid, LP in the recent case of *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. v. Karpal Singh* [1988] 3 MLJ 29 when speaking for the Supreme Court said:

> In other words, reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold.

In the result, the application must be and is dismissed.

Also found at [1989] 1 CLJ 203